(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 405 - 406

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
Debtor.

J. MARSHALL PEER AND W. D. WITTER,
Petitioners,

vs.

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC., AND HARRY FOOTE, ET AL.,
Respondents.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITIONS FOR WRITS OF CERTIORARI.

Now come D. W. Witter and J. Marshall Peer, appellees in Cases No. 8468 and 8475, consolidated by the opinion of the United States Circuit of Appeals for the Seventh Circuit, and pray for the issuance of Writs of Certiorari to review the judgments entered on June 14, 1944, affirming the order of the District Court in Case No. 8468 and re-

versing and modifying, in part, the order in Case No. 8475 to the end that the judgments may be reviewed by this Court.

Statement of the Matter Involved.

After the filing of the mandate of the United States Circuit Court of Appeals directing the District Court to dismiss the reorganization proceedings of the debtor under Chapter X for want of jurisdiction (134 F. (2) 839) the District Court allowed $4325.00 in fees to the trustee whose appointment was annulled by the Court of Appeals, to be deducted from the funds which he collected while acting as trustee for the debtor, and taxed these items as costs against the petitioning creditors, to be refunded to the Indenture Trustee, when and if collected. Instead of dismissing the proceedings pursuant to the mandate which was filed June 28, 1943, the District Court assumed jurisdiction of the petition of the trustee relating to rents to be collected subsequent to the date of the filing of the mandate. Thereafter, the District Court directed that petitioner J. Marshall Peer turn over to the trustee $7,033.40 which Peer collected in July and August, 1943 when the trustee was no longer in existence.

The Court of Appeals reversed that part of the order which taxed the $4,325.00 against the petitioning creditors and taxed it against the fund. It affirmed the order directing Peer to turn over the $7,033.40 to the trustee and the assignment of the claim to the Indenture Trustee. The Court of Appeals held that while its mandate directed the District Court to dismiss the proceeding for want of jurisdiction, it did not intend to deprive the District Court of jurisdiction to make allowances to its trustee and his counsel as compensation and to distribute the funds, and that it had the right to change its mandate on the second appeal.

The Important Facts.

The Court of Appeals for the Seventh Circuit, after deciding that a corporation dissolved for over two years could not be reorganized as a corporation under Chapter X (134 F. (2) 839) and after the denial of certiorari by this court (320 U. S. 211), issued its mandate which was filed in the District Court on June 28, 1943, reversing the order appointing the trustee and directing the District Court to dismiss the petition for lack of jurisdiction (R. 3). Instead of carrying out this mandate as directed, the District Court assumed jurisdiction of the petition of the trustee (whose appointment was thus reversed) presented to it on July 9, 1943 seeking further collections of the income from the premises, in violation of the mandate. Petitioner Witter moved at the same time for an order of dismissal pursuant to the mandate (R. 6), and the other Petitioner Peer, filed an answer denying the jurisdiction of the District Court of the subject matter of the petition (R. 7-8).

On July 22, 1943 the District Court entered an order pursuant to the mandate, dismissing the reorganization proceedings for want of jurisdiction (R. 9). Instead of stopping there, the Court assumed further jurisdiction of the trustee's petition and continued the hearing thereon to August 25, 1943. It, at the same time, ordered the trustee, whose appointment was reversed, to proceed with the collection of the future rent of the debtor's property (R. 9). On August 25, 1943 it ordered Peer to turn over to the non-existent trustee $7,033.40 which Peer collected *after* the filing of the mandate, in July and August, 1943 (R. 11). On September 21, 1943 the District Court allowed $2,500.00 in fees to the trustee and $1,750.00 to its counsel and $74.00 for the printing of the brief, to be deducted from the rents collected, and to assign the claim

against Peer to the indenture trustee (R. 15). Thereafter, on September 23, 1943, it entered a further order taxing the fees allowed to its trustee and its counsel against the petitioning creditors (R. 43-44).

The Questions Presented.

1. May a Bankruptcy Court compensate its appointed trustee and his counsel after the reversal of the order appointing the trustee for lack of jurisdiction of the parties and the subject matter?

2. May a Bankruptcy Court assume jurisdiction of a petition by its trustee to authorize him to collect future rents from the premises sought to be reorganized, and to direct the tenants to pay such rents to the trustee when the appointment of the trustee was annulled by the Court of Appeals for the lack of jurisdiction on the part of the court making the appointment and when its mandate was filed prior thereto?

3. Whether a Reviewing Court which had issued its mandate reversing the appointment of a bankruptcy trustee, and which instructed the District Court to dismiss the proceedings for lack of jurisdiction, had the power a year later to alter or amend its mandate so as to sustain an order of the District Court entered after the filing of its mandate and inconsistent therewith, because it appeared a year later to the Court of Appeals that if the matter had been presented to it its mandate would have been different.

4. In a case where petitioning creditors wrongfully invoked the jurisdiction of the Bankruptcy Court and procured the appointment of a trustee who entered upon possession of the property and collected the rent issues and profits and when such appointment was reversed for complete lack of jurisdiction of the subject matter of the parties, and where the District Court after the filing of the

mandate to dismiss the proceedings for lack of jurisdiction taxed the costs against the petitioning creditor, was it proper for the Court of Appeals to reverse such an order and to tax the costs against the fund collected and thereby charge the persons of whom the court had no jurisdiction with the cost for the wrongful seizure of their property?

5. Whether the District Court had jurisdiction to direct Peer to turn over the fund to the non-existent trustee, notwithstanding that he claimed to have collected all rents for the equity owner after the reversal of the order appointing the trustee.

Reasons for the Allowance of the Writ.

The following are the reasons for the allowance of the writ:

1. The Circuit Court of Appeals has decided an important federal question in conflict with applicable decisions of this court and of other circuits, in that it held:

(a) That a Bankruptcy Court whose appointment of a trustee was reversed for lack of jurisdiction of the subject matter and of the parties, may thereafter allow compensation to such trustee and his counsel and to tax same against the fund and not against the parties who wrongfully invoked the jurisdiction.

(b) In holding that a Bankruptcy Court may disregard the mandate of the Reviewing Court directing it to dismiss the bankruptcy proceedings for want of jurisdiction, and to proceed thereafter to authorize the bankruptcy trustee, whose appointment was annulled by the mandate of the Court of Appeals, to continue to manage and operate the property after the filing of the mandate, and sustaining such order on the theory that the Court of Appeals had the right to change and alter its mandate.

2. The decision of the Circuit Court of Appeals that it may alter or modify its mandate after the expiration of the term of the issuance of its mandate and the denial

of certiorari, upon a second appeal from the order which clearly violated the mandate, is in conflict with universal law relating to appellate procedure.

3. The questions presented are of great public interest and involve the construction of federal administration concerning bankruptcy and other equitable proceedings, in that:

(a) Where parties wrongfully invoke the jurisdiction of a court and obtain the seizure of the property through a bankruptcy trustee and it is later adjudicated that such seizure was without jurisdiction of the parties and the subject matter, the taxing of the expense against the funds collected deprives such parties of their property without due process of law in violation of the Fifth amendment to the Constitution.

(b) To permit a trial court to violate a mandate which annulled the appointment of its trustee and to authorize such a trustee, after the filing of the mandate, to continue to perform active duties, destroys the entire system of law and is contrary to elementary principles of duties of courts to comply with the mandates of the appellate court.

(c) The action of the Reviewing Court almost a year after it had issued its mandate and after the denial of certiorari in approving the orders of the trial court on the ground that the Court of Appeals could itself modify its mandate, is contrary to all existing law and destroys the doctrine of the "law of the case," *res judicata* and the ending of litigation.

(d) To permit petitioning creditors to file involuntary proceedings in bankruptcy and to incur costs by the appointment of a trustee, and after the reversal of the appointment and the direction to dismiss the proceedings for want of jurisdiction to relieve such petitioning creditors from their responsibility by taxing same against the funds, encourages persons to wrongfully invoke the jurisdiction of the court without taking the risk of being held liable for their wrongful acts.

4. There is no precedent for the power of a District Court to order third parties to turn over funds which such parties claim adversely to a trustee whose appointment was annulled by the mandate of the Court of Appeals, and in a proceeding which was ordered dismissed for lack of jurisdiction.

Prayer for Relief.

Petitioners jointly and severally pray that these petitions for Writs of Certiorari may be granted and that upon a final hearing the judgments of the United States Circuit Court of Appeals for the Seventh Circuit be reversed in both cases, to the end that that part of the order of the District Court which taxed the costs against the petitioning creditors be sustained, and that the order directing Peer to turn over funds to the nonexisting trustees be reversed.

Respectfully submitted,

J. Marshall Peer and
W. D. Witter,
Petitioners.

By Meyer Abrams,
Harold J. Green,
Maurice H. Kamm,
Attorneys for Petitioner.

Chicago, Illinois,
August 24, 1944.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit reversing the appointment of the trustee and instructing the dismissal of the proceedings by the Bankruptcy Court for want of jurisdiction is fully reported (134 F. (2) 839). Certiorari was denied here (820 U. S. 211). The opinion of the Seventh Circuit on the second appeal in the instant case is not yet reported and is printed in this record at Page 80.

Jurisdiction Invoked.

The judgment of the Circuit Court of Appeals for the Seventh Circuit affirming the judgment of the District Court in case No. 8468, was entered June 14, 1944 (R. 89). The judgment of the Circuit Court of Appeals modifying the judgment below, charging the administrative expenses to the fund and relieving the petitioning creditors from liability was also entered on the same day (R. 90). The petitions for rehearing were denied in both cases on June 29, 1944 (R. 107). The jurisdiction of this court is invoked under judicial code Section 240(a), 28 U. S. C. A. Section 347a as amended by the Act of February 13, 1925. The mandates were stayed during the pendency of this petition.

A Statement of the Case.

After the denial of certiorari by this court (320 U. S. 211) to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit, which held that the District Court was without jurisdiction of the subject matter and of the parties (134 F. (2) 839), the mandate

of that court was filed June 28, 1943 and is as follows (R. 3):

> "It is ordered, adjudged and decreed by this Court that the order or decree of the said District Court in this cause appealed from, be, and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said District Court with instructions to dismiss the petition for lack of jurisdiction."

On July 9, 1943 Petitioner Witter moved to dismiss the proceedings pursuant to the mandate (R. 6). On the same day, Fred Hummel, the trustee whose appointment had been reversed, filed a petition (R. 5) seeking to collect from Peer rents collected by Peer for the month of July. Peer filed an answer (R. 7) denying that he was collecting as agent for Hummel, since the filing of the mandate ousting Hummel for lack of jurisdiction on the part of the court which appointed him, denying Hummel's rights to rents accruing after the mandate and stating that he was collecting as agent for the equity owners.

On July 22, 1943, the District Court entered an order (R. 9) dismissing the petition for reorganization pursuant to the mandate filed June 28, 1943. At the same time the Court set for hearing the petition of the trustee with respect to the rent collected by Peer, for August 25, 1943 and directed the trustee whose appointment was voided to collect all August rents and ordered the tenants to pay the rents to the trustee, to be held subject to the further order.

On July 28th, 1943, Peer moved (R. 10) to vacate all portions of the order of July 22, 1943, except the first paragraph which dismissed the proceedings according to the Mandate, on the ground that the court had no jurisdiction to hear the other matters. On August 25, 1943, the court entered an order (R. 11) reciting that Peer had collected $7,033.40 from July 1 to August 21, 1943, and directed Peer

to turn the money over to the trustee to be held by him pending the order of the court as to the disposition of the funds.

The motion to vacate was continued several times and on September 21, 1943, the District Court entered an order which (R. 14) approved the trustee's reports, denied the motion of Peer to vacate portions of the order of July 22, 1943, fixed the compensation of Hummel as trustee at $1,750.00 and that of his counsel at $2,500.00, ordered any unpaid balance of these fees paid, and directed the federal trustee to turn over to the Heitman Trust Company, the debenture trustee, the balance of $16,254.11 and to assign to said indenture trustee his claim against Peer, and discharged the trustee upon compliance with the order. The court expressly refused to make a finding as to the ultimate rights of any parties against the funds or chose in action.

On September 23, 1943 the District Court entered an order (R. 69) that the fees of Hummel and his counsel aggregating $4,250.00 and the $74.00 paid by Hummel to the unsuccessful petitioning creditors for printing briefs, or a total of $4,325.00 be taxed as costs against the respondent, the petitioning creditors, G. J. Nickolas, G. J. Nickolas & Co. Inc. and Harry Foote, and judgment was entered against them, in favor of the Indenture Trustee, to be held "for the persons lawfully entitled thereto."

In Appeal No. 8468 to the Circuit Court of Appeals, Peer appealed from the order of September 21, denying his motion to vacate parts of the order of July 22, 1943, also from the turn over order of August 25, 1943, and from the order of September 21, 1943, approving the trustee's report and directing the trustee to pay himself and his counsel out of the funds then in his possession (R. 16). In Appeal No. 8475 Respondent Nickolas, *et al.*, appealed

from the order of September 23, 1943, taxing them with the trustee's and attorney's fees (R. 71). These two appeals were consolidated in one opinion rendered by the Circuit Court of Appeals on June 14, 1944 (R. 80).

The Circuit Court of Appeals affirmed the order of the District case on Appeal # 8468, saying that by its mandate on the previous appeal that the proceeding be dismissed for lack of jurisdiction it did not intend to prevent the District Court from awarding costs or disposing of the funds collected by the court's trustee; that if its mandate on the former appeal were to be construed to deny any jurisdiction to the District Court, it would correct its ruling in view of the facts concerning the moneys in the hands of the trustee.

In Appeal # 8475 the Circuit Court of Appeals modified the order of the District Court by eliminating the judgment against the petitioning creditors. It held contrary to its former opinion that the District Court was not wholly without jurisdiction; that the estate benefited by the services of the trustee and that the trustee and his counsel's fees were administrative charges to be paid out of funds on hand with the trustee.

In the petition for rehearing, it was pointed out that not only was the decision inconsistent with its decision on the prior appeal but that it had misconceived the facts in stating that the rents which Hummel sought to recover from Peer were collected by him before the filing of the mandate, as the rents were from July 1, 1943 to August 21, 1943 and the mandate was filed June 28, 1943. Rehearing was denied.

Specification of Errors Relied On.

The United States Circuit Court of Appeals for the Seventh Circuit erred:

(1) In holding that where a trustee's appointment is reversed and the petition for reorganization ordered dismissed for lack of jurisdiction over person and subject matter, the District Court may charge the fees of the trustee and his counsel against the fund collected by the trustee.

(2) In holding that where the mandate orders the District Court to dismiss for lack of jurisdiction bankruptcy proceedings in which a trustee has been appointed, the District Court may, after the mandate has been filed, disregard the mandate, continue the trustee in possession to collect the rents, and enter orders against persons claiming adversely to the trustee with respect to rents accruing after the filing of the mandate.

(3) In holding that it may almost a year after its mandate has been filed, modify the mandate so as to authorize the District Court to pay fees to the trustee and his counsel out of rents collected, where in the opinion, pursuant to which the mandate was issued, the court had held the District Court lacked jurisdiction to appoint a trustee and where the only new facts presented on the second appeal is the amount of money in the hands of the trustee improperly appointed, and where the law has not changed since the first opinion was written.

(4) In holding that the District Court had no jurisdiction to appoint a trustee but had jurisdiction to order him to collect rents from adverse claimants and to pay himself and his counsel fees out of the rents collected by the trustee, when the persons to whom those rents might belong were not before the court.

(5) In holding that where the court had jurisdiction over the petitioning creditors and another creditor objecting to the bankruptcy petition, it had no right to enter judgment against petitioning creditors for the expenses of administration where the petitioning creditor had improperly, though not in bad faith, invoked the aid of the bankruptcy court and failed to confer jurisdiction over a debtor or of the subject matter of a reorganization.

(6) In affirming the orders of the District Court improperly made in Cause # 8068 and in reversing the correct judgment of the District Court in Cause # 8075.

SUMMARY OF ARGUMENT.

I.

The District Court Was Without Jurisdiction to Allow $4,325 in Fees to Its Trustee and His Counsel Subsequent to the Filing of the Mandate Reversing the Appointment of the Trustee for Lack of Jurisdiction of the Subject Matter and of the Parties, and It Was Without Power to Tax Such Expense Against the Fund.

(a) The reversal of the order appointing the trustee had the same effect as though no trustee had ever been appointed.

(b) No fees may be allowed to a trustee in bankruptcy and his counsel where the appointment was reversed for lack of jurisdiction.

(c) The charge of the fees against the fund collected from property belonging to persons who were not before the court deprived them of their property without "due process" in violation of the Fifth Amendment to the United States Constitution.

(d) The mandate of the court required no interpretation and was binding upon the District Court as well as upon the Court of Appeals. The Court of Appeals had no right to modify its mandate upon the second appeal, because:

(1) No change of law or new facts intervened to bring the case within the rare exception of the Luminous Unit case cited by the court as justification for its action.

(2) The Luminous case doctrine has been cited by the Judge who wrote the instant opinion as authority

for the opposite proposition, that a District Court may not award damages where the mandate directs the dismissal for want of jurisdiction.

(c) The order taxing the costs and fees against the petitioning creditors was proper for:

(1) They wrongfully invoked the jurisdiction of the Federal Court and brought about the appointment of the trustee who seized the property.

(2) Restitution requires that the parties be made whole.

II.

The Order Directing Peer to Turn Over to the Non-Existent Trustee $7,003.40 Was Clearly Void and Based Upon a Misconception of the Facts and the Law.

(a) The material facts were misconceived because the rents which the order directed turned over were those which had accrued for July and August, 1943, after the filing of the mandate. The Circuit Court referred to the rents collected as being those arising before the mandate.

(b) After the appointment of the trustee had been reversed, there was no trustee *in esse*, and Peer could not have been the agent for the non-existent trustee. The District Court had no jurisdiction to determine the disposition of funds collected by Peer after the filing of the mandate.

(c) The reversal of the order appointing the trustee placed the parties in the same position as though no trustee had ever been appointed and the trial court was without jurisdiction to direct the non-existent trustee to collect rents thereafter accruing.

(1) Even though the mandate was silent as to the disposition of the funds in the hands of the trustee, the mandate ordering the proceedings dismissed could

mean but one thing—that the trusteeship come to an end and the court take appropriate steps to terminate it and divest the trustee of money he then had on hand, not to attempt to collect new money.

(2) The opinion justifying the action of the District Court constitutes a modification of the mandate on the first appeal, which it was not permitted to do lest litigation be encouraged in the hope that upon a subsequent appeal a different result might be obtained.

(d) The mandate issued on the first appeal was binding on the Court of Appeals on the second appeal and it had no right to deviate from its mandate which was limited to the dismissal of the proceedings for want of jurisdiction.

(e) The reversal of the Appointment of the trustee ended the jurisdiction of the District Court as to future management of the property, the collection of rent, and the application thereof. It was the duty of the Court of Appeals to reverse the order which authorized the trustee to collect rents after the filing of the mandate, and the turn-over order was void for lack of jurisdiction.

ARGUMENT.

I.

The District Court was without jurisdiction to allow $4,325 in fees to its trustee subsequent to the filing of the mandate reversing the appointment of the trustee for lack of jurisdiction of the subject matter and of the parties, and it was without power to tax such expense against the fund.

After the filing of the mandate on June 28, 1943 reversing the appointment of the trustee with instructions to dismiss the proceedings for want of jurisdiction, the District Court allowed to its trustee and his counsel on September 21, 1943 (R. 15) $4,325.00 as compensation, to be paid to them out of the rents collected. On September 23, 1943, it taxed the $4,325.00 against petitioning creditors (R. 69). The Court of Appeals reversed the latter order and sustained the former, all of which was clearly without jurisdiction and contrary to all decisions of this Court and other circuits.

In sustaining the payment of the $4,325.00 out of the fund to the Trustee whose appointment was annulled, the court said that when it reversed the appointment for lack of jurisdiction it did not intend to prevent the District Court "from awarding costs" and the District Court "correctly construed the order as a direction to it to dismiss, but with reservation to it to adjudge costs and make an appropriate order disposing of funds which had been collected by its appointed trustee." It further said that the reasonableness of the allowance to the Trustee or to his attorney, or of the costs, was not questioned. Of course, the reasonableness was not questioned, because the

court taxed the costs against the petitioning creditors and there was no occasion for these petitioners to inquire into the reasonableness of the amount which was not taxed against the fund.

(a) The reversal of the appointment operated as if no Trustee was ever appointed.

The mandate of the court merely directed the District Court to dismiss the proceedings for want of jurisdiction. The court *reversed* the order appointing the Trustee for lack of jurisdiction. *This mandate of reversal of the appointment was self-executing.* The only power conferred on the court to enter orders was the dismissal of the proceedings for want of jurisdiction. *This was a ministerial act* (4 Cor. Jur., page 1234). The reversal was *not on the ground that there was error* in the appointment but on the ground that *there was a complete lack of jurisdiction.* The opinion of the court in reversing the appointment of the Trustee was on the ground that *there was no bankrupt* of which the bankruptcy court had jurisdiction and, therefore, the court was without jurisdiction of the subject matter and of the parties. The court said in its former opinion (134 F. (2) 839):

> "Jurisdiction of this new proceeding had to be worked out by having first an entity that could be sued, and second a corporation found to be in existence, since only corporations can be reorganized under Chapter X of the Bankruptcy Act, 11 U. S. C. A. Sec. 501, *et seq.*
>
> "As to the first essential element, the having of an entity that could be sued, the corporation having been dissolved for more than seven years prior to the commencement of the proceedings, it was nonexistent and dead for all legal purposes. It could neither sue nor be sued. The service of process upon it was an impossibility."

The court also said:

> "The purported appearance and answer of the former corporation by the attorneys were a nullity. The corporation had been dead for seven years, and was incapable of appointing attorneys or exercising any other corporate function. Since the court had no proper party before it and could not subpoena the defunct corporation, it was without jurisdiction to proceed."

It also said:

> "For another reason the court was without jurisdiction to proceed, because the second essential element was lacking. It could not proceed under Chapter X of the Bankruptcy Act unless it had before it a corporation, as only corporations can be reorganized under this Chapter. This was a jurisdictional fact that did not exist and could not exist because the alleged debtor corporation was no longer *in esse*. There was no corporation to be reorganized."

Therefore the appointment was void *ab initio*.

(b) No fees may be allowed to a bankruptcy Trustee upon the reversal of the appointment for want of jurisdiction.

Where a court concludes that there was an utter lack of jurisdiction of the parties and the subject matter, the trial court can only dismiss the proceedings for want of jurisdiction and cannot make allowances to the Trustee and his counsel, who were appointed under the *void* order.

In *McRae* v. *Dodt*, 72 Pac. (2) 444, this question was discussed and the distinction between mere error in the entry of an order and lack of jurisdiction was pointed out. There the court said (p. 447):

> "We know of *no case* which holds that one who performs service under an order of a court which lacks jurisdiction of the *res* is entitled to recover a fee for his services from the corpus of the estate involved.

Under such circumstances, the logical and equitable rule is the same as that which applies when one has performed services at the request of an agent who acts without any authority, apparent or real, from his alleged principal. It is the agent who is responsible for the services, not the principal. It is generally held, therefore, that where a receiver is appointed at the request of certain parties and the appointment is without legal authority and void, *that the expenses of the receivership are chargeable to those parties at whose instance the receiver was appointed and not to the receivership fund. Couper* v. *Shirley* (C. C. A.), 75 F. 168; *Grant* v. *Los Angeles & P. R. Co.*, 116 Cal. 71, 47 P. 872; *Bowman* v. *Hazen*, 69 Kan. 682, 77 P. 589; *State ex inf. Hadley* v. *People's etc., Bank*, 197 Mo. 605, 95 S. W. 867." (Italics ours.)

This rule was followed in *Bowersock Mills & Power Co.* v. *Joyce*, 101 F. (2) 1000. At page 1002, the court said:

"The general rules are that where a receiver is *regularly and lawfully appointed*, his expenses and compensation *are to be charged only against the receivership funds and not against the party who procured his appointment*, but that where the appointment of the receiver was irregular or inequitable or *the court which appointed him was without authority so to do, the party who procured the appointment, and not the receivership fund*, is liable for the expenses of the receivership." (Italics ours.)

This rule is also applicable in bankruptcy (*In Re. Philadelphia & Lewis Trans. Co.*, 127 F. 896).

The funds collected by the trustee whose appointment had been reversed belonged to the stockholders of the dissolved corporation (*R. F. C.* v. *Teter*, 117 F. (2) 716). Since they were not before the court and since the court had no jurisdiction over the fund illegally collected (and in the absence of the parties who might be entitled thereto could adjudicate no rights), the District Court properly ordered

the money turned over to the Indenture trustee, without making any finding as to the rights the parties who might ultimately be entitled thereto (R. p. 70). That determination is the province of a court having jurisdiction of the parties and the subject matter.

But the court committed grave error in deducting from this fund the fees of the trustee and his counsel, the cost of the brief of unsuccessful petitioning creditors and depleting the fund in excess of $4,300.00. The reasonableness of the trustee's fees and of his counsel and the small amount of the brief charges, are immaterial. The important point is that these charges were deducted from *funds belonging to persons not before the court and who had no opportunity to contest the payment of these amounts.* After reversal, these parties were entitled to the return of their property and the money collected therefrom, free of the charges of a trustee and his counsel illegally imposed upon them. Both the decision of the District Court and that Court of Appeals in depriving them of their rights when they were not before the court clearly violates the "due process" clause of the Fifth Amendment to the United States Constitution.

(c) The Mandate of the Court required no interpretation and was binding on the District Court as well as on the Court of Appeals and the latter was without jurisdiction to change its mandate on this appeal.

The mandate was to dismiss the proceedings for want of jurisdiction. This was not only binding on the District Court to whom it was directed, but also on the Court of Appeals, which issued the mandate (*Casey* v. *Sterling Ceder Co.*, 15 F. (2) 52; *Hart* v. *Wiltsee*, 25 F. (2) 863; *Foster Brothers Manufacturing Co.* v. *N. L. R. B.*, 90 F. (2nd) 948; *Raymond* v. *Wickersham*, 129 F. (2) 522). The

trial call may take no action not consistent with the mandate (*Fleniken* v. *Great American Indemnity Co.*, 142 F. (2) 938, 939).

The opinion relies on the right to modify a mandate under the decision in *Luminous Unit Company* v. *Freeman-Sweet Co.*, 3 F. (2) 577. In that case the Court *distinguished* the *Lackner* case (2 F. (2) 516) on the ground that in the Lackner case no decision of the Supreme Court changing the law had intervened between the first appeal and the second appeal, while in the *Luminous* case, such a decision intervened wherein the Supreme Court of the United States "announced a decision at variance with the opinion" on the former appeal. No such decision was announced here at variance with the opinion rendered on the first appeal.

It is curious to note that the Judge who wrote this decision and relied on his previous opinion in the *Luminous* case as authority for the District Court to violate the mandate in the Court of Appeals, cited the *Luminous* case for the *opposite* proposition. Judge Evans wrote the opinion in *Chain O'Mines* v. *United Gilpin Corporation*, 131 F. (2) 824. After the Seventh Circuit had reversed a decree against the defendant in favor of the plaintiff with directions to dismiss the complaint for want of equity, the District Court "ignored the mandate" and retained jurisdiction to allow damages to the defendant. The retention of the jurisdiction in that case was under the doctrine of restitution. However, the Court of Appeals was jealous of its mandate and in reversing the order said (p. 825):

> "The retained jurisdiction of the Court for the purpose of permitting a trial and an award of damages violated the mandate of the Court of Appeals which definitely controlled the action of the District Court."

In support of the foregoing, *he cited Luminous Unit Co.* v. *Freeman-Sweet Co., supra.*

In an effort to overcome the force and effect of its decision upon the first appeal, the Court of Appeal says:

> "Even though the mandate issued in the former appeal were to be construed to deny any jurisdiction to the District Court, this court would now correct its ruling in view of the facts concerning the moneys in the hands of the trustee, etc., for the first time now disclosed to us. They were not presented or considered on the previous appeal."

The Court of Appeals did not point out to any change in the law, nor has it pointed out to any change in the facts. The only reference it may have is to the amount of money which the trustee was possessed. It knew, however, that the trustee was managing the property and was collecting the income and that such question would come up upon the reversal of its appointment, for it appears from the opinion of the court on the previous appeal, that it knew of the existence of such facts. Under no stretch of the imagination does the decision in *Luminous* case on which it relies, apply to the instant case.

In citing it for the opposite view in *Chain O'Mines* v. *United Gilpin Corporation*, 131 (2nd), 824, *supra*, Judge Evans also said:

> "The District Court under the plain mandate of the Appellate Court was under the compulsion to dismiss the suit. If the defendants desired different and additional relief they should have sought and secured a modification of the mandate of the Appellate Court."

This was not done in the instant case.

(d) The order taxing the costs and fees against the petitioning creditors was proper.

The District Court properly taxed the costs and expenses against the petitioning creditors and this order should have been affirmed. When petitioning creditors

invoked jurisdiction of a bankruptcy court and their petition has been dismissed for want of jurisdiction, the bankruptcy court had the power to tax the costs against the petitioning creditors. This is on the theory that it is the duty of the parties invoking the jurisdiction wrongfully *to make restitution* (3 Am. Jur. pp. 739, 740). The fact that the petitioning creditors originally entered into the proceedings as intervenors is of no importance, because they, as intervenors, filed a new petition in 1941 and had their plan approved by the court. Their proceeding was a new proceeding and they stand in the position of petitioning creditors. Besides, *intervenors who assume active participation in the trial of a cause are chargeable with the costs* (2 C. J. S., Sec. 118). The Trustee was appointed at the instance of the intervening petitioners, who filed the involuntary petition in 1936. Counsel for the Trustee was appointed in the proceedings wrongfully invoked by them. They are chargeable with all of the costs of such proceeding.

The statement of the court that if the indenture trustee be taxed with costs, it would be charged against the bondholders, is based upon an erroneous assumption that where an indenture trustee commences a wrongful action, that he may charge the estate with the expense of the wrongful prosecution of his suit. Only where the indenture trustee invokes the proceedings lawfully and the reversal is on the ground of error in judgment could an indenture trustee recover the expenses. Where, however, the proceedings are void, the Trustee personally must bear the expenses. At any rate, the issue whether the indenture trustee should also be taxed for the costs was not presented on review and this should not have influenced the court in rendering its decision.

While in *Chain O'Mines* v. *United Gilpin Corp.*, 131 F. (2) 824 the court held that on a mandate to dismiss, the

court cannot award damages to the successful party on appeal this is inapplicate to cases involving seizure of property.

The leading case involving *restitution* is that of *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216. There the plaintiff and the defendant were before the court but the reversal for lack of jurisdiction was because of the failure on the part of the plaintiff to allege diversity of citizenship. In the meantime, the plaintiff had collected part of the judgment rendered in his favor and against the defendant. The court sustained the lower court in entering judgment against the plaintiff in favor of the defendant for the amount which the plaintiff had recovered under his illegal judgment. The court said (page 219):

> "But here the jurisdiction exercised by the court below was only to correct by its own order that which, according to the judgment of its appellate court, it had no authority to do in the first instance; and the power is inherent in every court, whilst the *subject matter of the controversy is in its custody, and the parties are before it, to undo that which it had no authority to do originally,* and in which it, therefore, acted erroneously, and to restore as far as possible, the parties to their former position. Jurisdiction to correct what has been wrongfully done must remain with the court *so long as the parties and the case are properly before it.*"
>
> * * *

The identical question was decided adversely to petitioning creditors and intervenors (*In Re Snowden*, 36 F. (2) 282, 283; *Benitez* v. *Bank of Nova Scotia*, 109 F. (2) 743, 750, C. C. A. 1).

The District Court properly charged the cost and expense to the persons who wrongfully invoked the jurisdiction and the reversal of the order is in conflict with the decision of this Court.

this Court, and with the decision of the First Circuit.

II.

The order on Peer to turn over $7,033.40 to the non-existent trustee was clearly void and its affirmance was based on misconceptions of facts and law.

The affirmance of the order on Peer to turn over $7,033.40 to the Trustee, after the reversal of the order appointing the Trustee and the filing of the mandate, cannot be sustained on any theory and the court misconstrued the facts and overlooked the settled law as to the invalidity of the order.

(a) Misconception of Material Facts.

In giving the "historical statement" of the proceedings, the court assumed that the $7,033.40 was collected *before* the filing of the mandate. The contrary appears from its statement in the next paragraph that the mandate was filed June 28, 1943 and that on August 25, 1943, the court ordered the return of the $7,033.40 collected from July 1 to August 21, 1943. It is obvious that this was rent collected *after* the filing of the mandate and *not before* the filing. In fact, the petition of the Trustee (R. 5) asked for the rent collected for the month of July, 1943, which was *subsequent* to the filing of the mandate.

This fact is of extreme importance because the mandate of the court which was filed June 28, 1943, prior to the filing of the Trustee's petition, *reversed* the "order or decree" appointing the Trustee, which was "appealed from," and directed the trial court to dismiss the petition for lack of jurisdiction. The only function of the court was to enter the order dismissing the petition. The reversal of the order of June 17, 1942 *ipso facto* reversed the appointment of F. E. Hummel as Trustee. Upon the filing of the mandate, *he ceased to exist.* The subsequent

filing of the petition by him as *Trustee* and the order of the District Court on Peer to turn over the rents to Hummel *as Trustee,* when the office of the Trustee was no longer *in esse* was a nullity.

Whether or not the $7,033.40 collected for July and August, 1943, *subsequent* to the filing of the mandate, belonged to Peer, is a question to be decided in a court of competent jurisdiction between the parties claiming the fund. The District Court was without jurisdiction to determine the disposition of such fund, which Peer collected at a time when no trustee was in existence.

(b) Peer Was Not the Agent of the Trustee.

The statement of the court that Peer was the agent of the Trustee is faulty because subsequent to June 28, 1943, there was no longer a trustee *in esse* and Peer could not have been the agent of a non-existent trustee. Peer was in possession of the premises *prior* to the appointment of the Trustee as "Owner," as it appears from the report of Hummel (R. 67-68) that he collected "from Mr. Peer monies that he had collected as rental" *prior* to his appointment as Trustee, in the sum of $3,766.62. Peer was *not the agent of the Trustee for rents collected prior to his appointment* nor was he his agent after he *ceased* to exist.

The question whether Peer collected the rents as agent for the Trustee or as agent for someone else, or for himself was a question to be determined by a court having jurisdiction of the subject matter. The District Court was without jurisdiction to determine the disposition of the funds collected subsequent to the filing of the mandate.

(c) Misconception of Law.

Conceding *arguendo* that the Court of Appeals did not intend by its mandate reversing the appointment of the Trustee and directing the dismissal of the proceeding for want of jurisdiction to prevent the District Court from disposing of the "monies collected and held by the Trustee" as it says in its opinion, it certainly did not intend to authorize the Trustee, whose appointment was reversed, *to continue to collect the rent subsequent to the reversal* or to authorize the District Court to direct its non-existent Trustee to collect the rent thereafter.

It appears from Peer's answer that he was collecting the rents for July and August *not as the agent for the non-existent Trustee,* but for the owner of the equity (R. 7). The statement of the court that "Peer was merely an agent of the court's Trustee" is based on its misconception of the fact that in July, 1943, *Peer was no longer the agent of the Trustee* whose office expired *automatically* upon the filing of the mandate which *reversed* his appointment.

(d) The reversal of the order appointing the Trustee placed the parties in the position as if no trustee was ever appointed and the trial court was without jurisdiction to direct the non-existent trustee to collect the rents thereafter.

We have shown above that upon the filing of the mandate on June 28, 1943, the appointment of the Trustee was vacated. The ground being lack of jurisdiction the order was void *ab initio.* In defiance of the mandate the trial court ordered on July 22, 1943 (R. 9) that the Trustees which the Court of Appeals ousted June 28, 1943, should continue "to collect all August rent" and it directed the "tenants" to pay him the rent. Thereafter, on August 25, 1943, the

trial court ordered Peer to turn over to Hummel as Trustee the $7,033.40 collected "from July 1, 1943 to August 21, 1943." *There is no precedent for such orders.*

The reversal of the order appointing the Trustee for lack of jurisdiction placed the parties in the same position *as if the appointment was never made* (*Kaplan* v. *Joseph,* 125 F. (2) 602). The reversal operated as if no trustee was ever appointed (3 Am. Jur., p. 647). Upon the filing of the mandate on June 28, 1943, *the life of the Trustee was at an end.* It was "stone dead" in the language used by Judge Evans in the former opinion. The trial court had no right to prolong the life of the Trustee to August, 1943, as it had no right to *resurrect* him after his "death." It follows that the orders were *void* and the court clearly erred in affirming the void orders.

Regardless of the silence of the mandate as to the disposition of the funds in the hands of the trustee, the mandate ordering the proceedings dismissed for lack of jurisdiction could mean but one thing: that the trusteeship, which was reversed, come to an end and that the court take appropriate steps to terminate the trusteeship, and divest the trustee of money he then had on hand; not to attempt to collect new monies.

The opinion in sustaining the right of the District Court, in the case at bar, to continue the trusteeship beyond the period of the date of the mandate and to order the trustee to collect rents subsequently accruing, constitutes a modification of its mandate on the former appeal which it was not permitted to do. A mandate of a reviewing court becomes the law of the case upon a subsequent appeal. (*Casey* v. *Sterling Ceder Co.,* 15 Fed. (2d) 52.)

The Court of Appeals decided upon the previous appeal that the District Court lacked such jurisdiction over the subject matter and over the parties and it was improper

to appoint a trustee and reversed that appointment. The second appeal brought before the Court the same question, the right of the District Court to continue the trusteeship and to order the trustee to collect the rents coming due after the filing of the mandate. The direction to the trustee to continue collecting the rent was *inconsistent* with the mandate which reversed the appointment and which directed the dismissal of the proceedings. Bringing in new funds into the trustee's hands was not consistent with the dismissal of the case and the reversal of the appointment. The law announced in this decision, if permitted to stand, would destroy the general principals of our jurisprudence and encourage litigation in the hope that upon a subsequent appeal a different result might be obtained. (*U. S.* v. *Cannon*, 184 U. S. 572, 574.)

Conclusion.

We have shown that the decision reversing the order taxing the costs against the petitioning creditors who wrongfully invoked the jurisdiction of the Court conflicts with the decision of other circuits. We have also shown that the affirmance of the order authorizing the trustee to continue to manage the property after the reversal of the order of the appointment was in violation of the mandate, that the order charging the fees and the expenses of the trustee and its counsel against the fund cannot be sustained on any theory and that the judgment against the petitioning creditor was proper and that the Court of Appeals clearly erred. It follows that the Writ should be granted.

Respectfully submitted,

MEYER ABRAMS,
HAROLD J. GREEN,
MAURICE KAMM,
Attorneys for Petitioners.

Chicago, August 24, 1944.

(22)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 405-6

IN THE MATTER OF
PEER MANOR BUILDING CORPORATION,
Debtor.

J. MARSHALL PEER AND W. D. WITTER,
Petitioners,

vs.

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC.,
AND HARRY FOOTE, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

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BRIEF OF RESPONDENTS IN OPPOSITION.

STATEMENT OF FACTS.

The facts stated by petitioners involve so many imperfections and omissions that we deem it necessary to outline the facts appearing of record herein.

1. There had been a voluntary petition filed in the District Court July 23, 1936 under Section 77-B of the Bank-

ruptcy Act in the name of Peer Manor Building Corporation representing itself to be an Illinois corporation (Tr. 29-30). This petition resulted in the confirmation of a reorganization plan whereby the first mortgage indebtedness was extended to mature on November 28, 1941. In the final decree that was entered therein jurisdiction was reserved to enter any decrees necessary to enforce the plan (Tr. 31-47).

2. On expiration of the extended period a default occurred and on December 5, 1941 the respondents herein, all being creditors, and the Heitman Trust Company, Indenture Trustee, under the first mortgage trust deed, which was the subject of the extension, jointly filed a petition in the above mentioned suit under the provisions of Section 127, Chapter X of the Bankruptcy Act. This petition alleged the default and sought a further reorganization under that Chapter (Tr. 47-54). The court approved this petition and appointed a trustee (Tr. 55-60). The record does not show that any one sought the appointment of the trustee.

This order was appealed from and reversed by the Seventh Circuit Court of Appeals, 134 Fed. (2d) 839. That court held that there was not a pending proceeding within the meaning of Section 127 of Chapter X of the Bankruptcy Act, and that hence the petition could not be considered as filed in a pending proceeding, but must be considered as a new petition, and hence there was no jurisdiction established under Section 127 of Chapter X of the Bankruptcy Act. The court held further that this petition could not prevail as a new petition because it was directed to a corporation which no longer existed, having been dissolved more than two years by decree of a court prior to the time of filing the petition, and that under the law of Illinois a corporation was termi-

nated for all purposes two years after a decree of dissolution, and that hence there was no entity before the court to be reorganized, and that, therefore, there was no jurisdiction of the court. The court by way of dicta stated a great many things not here relevant. Afterwards a petition for certiorari was denied by this court and the Circuit Court of Appeals filed its mandate on June 28, 1943 ordering the petition dismissed and assessing costs against "the appellees, G. J. Nikolas, G. J. Nikolas & Co., Inc., et al." A bill of costs was filed with the mandate and was paid (these costs are no part of this controversy).

3. On July 9, 1943 Witter, petitioner herein, moved in the District Court for a judgment of dismissal on the mandate and for a Rule on the Trustee to account. On the same day the trustee, Hummell, petitioned the court for an order on Peer, his agent, to turn over to him the moneys that Peer had collected, as such agent. Peer sought and obtained leave to answer the trustee's petition. Judgment for costs was entered that day (these are not the costs herein in issue). The matter was continued to July 22, 1944, apparently to afford Peer an opportunity to answer (Tr. 7).

4. On July 22, 1943 the court entered an order dismissing the petition pursuant to the mandate, continuing the hearing on the petition of the trustee and the answer of Peer to August 25, 1943 to be heard before Judge Barnes (the Judge who had heard the case originally), and ordering the trustee to file his report and account in 20 days, and setting the hearing on the trustee's reports for August 25, 1943, and ordering the trustee to collect the rents for August, same to be held subject to further order of the court after the hearing on August 25, 1943 (Tr. 9).

On July 28, 1943 Peer filed a motion to vacate all of the order of July 25, 1943, except that part dismissing the petition (Tr. 10). This motion was continued to August 25, 1943 (Tr. 11).

5. On August 25, 1943 the court heard the petition of the trustee to compel Peer to account, and found that Peer had collected income totaling $7,033.40 while acting for the trustee, and ordered Peer to deliver this sum to the trustee together with any other rents collected by him from the building operated by the trustee, the moneys to be held by the trustee pending determination and order of disposition by the court (Tr. 11-12). Notice of appeal from this order was filed October 19, 1943 (Tr. 16-17) (56 days after the entry of the order).

6. The petition of Peer to vacate the order of July 22, 1943 and the final report of the trustee came on for hearing September 21, 1943 on which date the court entered an order approving the trustee's report and denying the motion of Peer to vacate part of the order of July 22, 1943, fixing fees of the trustee and his counsel and ordering the trustee to reimburse himself for the balance of fees allowed and to pay to his counsel the balance of counsel fees, allowed from funds in his hands and to pay over to the Indenture Trustee the balance of the moneys held by the court's trustee, subject to unknown operating liabilities and taxes claimed against the trustee, if any, and directed the trustees to assign to the Indenture Trustee his claim against Peer for rents under the order of August 25, 1943, and to assign any other claims against Peer which he had for rents. The trustee was ordered discharged upon the filing of a supplement to his final report showing performance by him of the commands of this order (Tr. 14-16). This order was also appealed on October 19, 1943 by Peer.

Witter who now joins in the petition for certiorari did not join in the appeal from the order of August 25, 1943, or from the order of September 21, 1943 (Tr. 16-17).

7. On September 23, 1943 the court entered an order reciting that the court was advised that by virture of the mandate of the Circuit Court of Appeals "all costs should be taxed against the petitioning creditors, G. J. Nikolas, G. J. Nikolas & Company, Inc., and Harry Foote," and further recited the fees allowed to the trustee and his counsel and found them reasonable, and ordered that these fees aggregating $4250.00, and a printing bill of $75.00 all totaling $4325.00 "be and they are hereby taxed as costs against the petitioning creditors." The order thereupon directed that judgment enter against these respondents, G. J. Nikolas, G. J. Nikolas & Company, Inc., and Harry Foote in the amount of $4325.00, and execution to issue (Tr. 69-70). These respondents appealed from the last named order on October 22, 1943 (Tr. 71).

8. The Circuit Court of Appeals affirmed the order of August 25, 1943 requiring Peer to account and affirmed the order of September 21, 1943 denying the motion of Peer to vacate the order of July 22 in part and allowing fees to the trustee and his counsel, and directing them to be paid from funds in the hands of the trustee (Tr. 89). It modified the order of September 21, 1943 to eliminate the judgment against these respondents for "costs" and directed that the administrative expenses be paid out of moneys on hand (Tr. 90).

ARGUMENT.

These respondents are defending the order of the United States Circuit Court of Appeals sustaining the District Court's orders of August 25, 1943 and that part of the District Court's order of September 21, 1943 which denied the motion of Peer to vacate the order of July 22, 1943 in part, and are defending the order of the United States Circuit Court of Appeals modifying the order of September 23, 1943.

We are not defending that part of the order of the Circuit Court of Appeals which affirms that part of the order of September 21, 1943 which allowed fees to the trustee and to his counsel. We alone opposed that part of the order in the District Court and hence are not in a position to defend it here. However, we wish to call to the court's attention that the beneficiaries of that order were the trustee and his counsel. They are the proper parties respondent to that phase of this petition for certiorari. Neither of them have been made respondents either in the Circuit Court of Appeals nor in this court and the record does not disclose that they have had notice of this proceeding on appeal.

I.

The order of July 22, 1943 was within the jurisdiction of the court and hence the motion to vacate was properly denied.

The mandate of the Circuit Court of Appeals was to dismiss the petition for want of jurisdiction because

there was no pending case within the meaning of Section 127 of Chapter X of the Bankruptcy Act, and because there was no party respondent before the court (See opinion 134 Fed. (2nd) 839).

Certainly the mandate to dismiss could not have meant that the District Court should dismiss the cause and leave the court's officer in possession of a building and a large sum of money without accounting and without order of disposition. As an incident to the dismissal the court had a duty to divest itself of what it had taken without jurisdiction. To do this it was necessary to require an accounting of its officer. When the mandate was presented to the court on July 9, 1943 Peer already held moneys he had collected as the agent of the trustee, the amount he had refused to disclose and account for. Had he properly accounted the court would likely have disposed of the matter on that day by dismissing the petition and directing its officers as to their manner of divesting themselves of the property and money they held, but Peer who now complains of the failure to dismiss on that day then sought delay; he asked leave to answer the trustee's petition. When that answer came before the court the petition was dismissed.

Witter recognized the duty of the District Court when he presented the mandate, as he moved at that time for rule on the trustee to file his final report and account (Tr. 6).

We concede that a court of the first instance acting on a mandate finding a lack of jurisdiction and directing a dismissal of the cause for such lack can only enter orders incident to dismissal and has no right to adjudicate any new matter. We submit, however, that the action of the District Court in so far as it was con-

fined to compelling its officers and their agents to account and turn over funds that had been obtained by them was not adjudication of any new matter, but was a proper action on the part of the District Court incident to carrying out the mandate for dismissal, and was necessary to divesting itself of moneys and property it had taken, and which, according to the judgment of the Appellate Court, it had no authority to take. It was an effort on the part of the court to correct its own orders in accordance with the mandate. That a court may enter such orders after having been reversed for lack of jurisdiction, but may not take any new affirmative action is established by the opinion of this court in *Northwestern Fuel Co.* v. *Brock,* 11 Sup. Ct. 523, 524; 139 U.S. 216.

II.

AUG

The order of ~~July~~ 25, 1943 was not appealed from within the time provided by law.

For another reason, the petition for certiorari should be denied, in so far as it applies to the order of August 25, 1943, which order directed Peer to account and turn over moneys, inasmuch as this order was not appealed from until the 19th day of October, 1943 (Tr. 16-17), which date was 56 days after the entry of the order.

The jurisdiction of the Circuit Court of Appeals to review an order entered in the bankruptcy court is derived from Section 24 of the Bankruptcy Ast as amended (Sec. 47, Title 11, U.S.C.A.), Sec. 25 (a), (Sec. 48 (a), Title 11, U.S.C.A.) which unequivocally fixes a limitation of the time in which that jurisdiction may be invoked; that time is fixed at "thirty days after written notice to the aggrieved party of the entry of the judgment,

order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry." The record does not show whether written notice was served, but by either test this appeal was not taken to the Circuit Court of Appeals within the time limit fixed by the statute, it being 56 days after the entry of the order. Whether the District Court had jurisdiction to enter that order or not the Circuit Court of Appeals was wholly without jurisdiction to review the order on the appeal taken more than 40 days after its entry. If the order was void it could be disregarded. If it was voidable the parties by their failure to appeal it within the statutory period permitted it to become final and binding. *In re Country Club Bldg. Corporation,* 128 Fed. (2d) 36-37, C.C.A. 7.

This same statute before being amended to its present form contained a similar provision limiting the time of taking appeals to 30 days after judgment. The courts have consistently construed this limitation to be binding and have held appeals not taken within the statutory period invalid. *Clements* v. *Conyers,* 31 Fed. (2d) 563, 564, *In re Fox West Coast Theatres,* 88 Fed. (2d) 212, 221, C.C.A. 9, *In re Interstate Oil Corporation,* 63 Fed. (2d) 674, 675, C.C.A. 9, *Shreiner, et al* v. *Farmers' Trust Co. of Lancaster,* 91 Fed. (2d) 606, 607, C.C.A. 3, *Broders* v. *Lage,* 25 Fed. (2d) 288, 290, C.C.A. 8.

The Fifth Circuit Court of Appeals held in *Vaughan* v. *American Ins. Co. of Newark, N.J.,* 15 Fed. (2d) 526, 527, C.C.A. 5, on page 527 that it was a well settled principle "that statutes limiting the time in which appeals and writs of error may be brought are mandatory and jurisdictional." Acting on another statute this court applied the same principle in *Old Nick Williams Co.* v.

United States, 30 Sup. Ct. 221 (215 U.S. 541) where this court stated on page 223, Sup. Ct. edition:

> "The delay in the present case in taking out the writ of error was not the act of the court, but of petitioner. At all events, petitioner might have brought its writ of error within the time prescribed by statute, *and the court had no power to allow it after the time limited had expired.*" (Italics ours.)

This court applied the same doctrine in the case of *Credit Co., Limited* v. *Arkansas Cent. Ry. Co., et al.,* 9 Sup. Ct. 107 (128 U.S. 258), in which the court dismissed an appeal brought after the time for filing same had expired.

The jurisdiction of the Circuit Court of Appeals to review, affirm, revise or reverse derived from Sec. 47, Title 11 U.S.C.A. by its terms applies to orders which are "either interlocutory or final," and sub-paragraph b of this same section says, "Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

It, therefore, seems clear to us that there was no jurisdiction in the Circuit Court of Appeals to review the order of August 25, 1943, but since the court did not alter, modify or revise that order in any manner the petition to review its action thereon should be denied.

III.

The order of the District Court entered September 23, 1943 assessing "costs" was not a proper order under the mandate of the United States Circuit Court of Appeals.

The order of September 23, recited " 'that by virtue of the mandate of the Circuit Court of Appeals direct-

ing this court to dismiss the instant proceeding, all costs should be taxed against the petitioning creditors, G. J. Nikolas, G. J. Nikolas & Company, Inc., and Harry Foote' " (Tr. 69).

An examination of the mandate (Tr. 64-66) does not disclose authority for any such order. The mandate provided that Witter recover against "the appellees G. J. Nikolas, G. J. Nikolas & Company, Inc., et. al. the sum of $206.88 for costs herein expended with direction," and there was annexed to this mandate a bill of costs aggregating $206.88 (Tr. 65-66). This was pursuant to Rule 24 of the Circuit Court of Appeals for the Seventh Circuit. It was proper for the District Court to enter a judgment on this mandate for the costs therein taxed. Such a judgment was entered when the mandate was presented to the District Court on July 9, 1943 (Tr. 7). (These costs are not any part of the judgment appealed from. They have been satisfied.)

The "et al" in the mandate refers to and includes Harry Foote and Heitman Trust Company, Indenture Trustees. The Heitman Trust Company was just as much an appellee and was just as much a petitioner as were any other parties. The petition which the court was acting upon was filed jointly by the Heitman Trust Company and the respondents herein. The petition appears on pages 21 to 28 of the transcript. See also notice of appeal (Tr. 37) and also the first paragraph of the order which was appealed from and which was the order reversed by the mandate (Tr. 29). All of these show the Heitman Trust Company as Indenture Trustee participating as a party petitioner and as a party appellee. The Circuit Court of Appeals did not distinguish between appellees, but included them all in its mandate equally. The District Court pretending to obey the man-

date selected some of the appellees and entered its judgment against them and made that judgment run in behalf of another appellee against whom the Appellate Court had taxed the real costs along with these respondents.

This failure on the part of the District Court to observe the provisions of the mandate is sufficient answer to the argument of petitioners that the Appellate Court was bound by its mandate and could not disturb the action of the District Court. Certainly the Appellate Court on a proper appeal presented could determine whether or not the District Court had correctly construed its mandate and this is all that the Appellate Court did in this case.

Certainly there could be no excuse for the District Court, under the guise of obeying the mandate, to select certain of the parties against whom the Appellate Court had assessed costs and direct that they pay the costs to another party against whom the Appellate Court had assessed the costs jointly.

IV.

The respondents herein were not the original petitioners but were interveners in a pending proceeding. Their intervention was in good faith relying on existing decisions of the Court of Appeals.

The District Court refers to these respondents as petitioning creditors (Tr. 69-70).

The record shows that these proceedings were initiated by a voluntary petition, and that one of the very parties who are here asking for certiorari was one of the initiators of the proceedings (Tr. 28-30). It shows

that these respondents came into the proceedings first by way of intervention (Tr. 31). It also shows that the petition filed by these respondents jointly with Heitman Trust Company was filed by them in the existing proceeding which demonstrates that their purpose was to file it under Sec. 127 of Chapter X of the Bankruptcy Act as an intervention in a pending proceeding (Tr. 47). It is true that the reviewing court held (134 Fed. (2d) 839) that there was not a pending proceeding within the meaning of Sec. 127.

We are aware that there are cases in bankruptcy where costs of receivership are taxed against petitioning creditors who had filed petitions for the purpose of harassing the debtor, or had made fraudulent concealments, or misled the court in some way, or had improvidently or fraudulently induced a preadjudication appointment of a receiver, or a preadjudication seizure of property. These cases have no application to the case here before the court. The manner in which these respondents came into the proceeding is significant, only from the standpoint that not being the initiators of the proceeding they did not have the burden of ascertaining whether there was in fact an existing corporation, constituting an entity under the laws of Illinois, which could be required to respond to process. They filed a petition in a proceeding in which the District Court had already held that it had jurisdiction of the debtor, and that holding had not been appealed from. In filing their petition they acted under the assumption that the court had sufficient jurisdiction to proceed under Chapter X of the Bankrupty Act, and the District Court held that it did have such jurisdiction. True, the District Court was reversed, but it would hardly seem equitable to penalize a creditor for seeking to enforce his rights in

the proceeding in which the court where his petition was filed conceived it to be a pending proceeding, where such creditor had nothing to do with bringing about a proceeding in the first instance. There is here no indication that the District Court was in any manner misled into approving the petition and appointing the trustee and incurring the expenses of trusteeship by any misrepresentation of these respondents, or by any negligence on their part in failing to bring before the court any matter that they had the duty to ascertain or disclose. They were bona fide creditors that owned bonds which were in default. They were later held to have misconceived their remedy, but in order to so hold the Circuit Court of Appeals found it necessary to reverse two of its prior decisions by express statement in its decision (*In re Peer Manor,* 134 Fed. (2d) 839). These two prior decisions were *In re 211 East Delaware Place Building Corporation,* 76 Fed. 2d, 834, and *In re Park Beach Hotel Building Corporation,* 96 Fed. 2d, 886. The court had the power and, if it was convinced that those decisions were wrong, it had the duty to reverse them, but until reversed parties litigant had a right to rely upon them. Those decisions had held that an involuntary petition would lie against a corporation for the purpose of reorganization under the bankruptcy laws notwithstanding that the two-year statute had run under the Illinois law. The rule for assessing receivership costs against a petitioning creditor is bottomed on the grounds that there should be discouraging penalties imposed on those who harassingly avail themselves of the processes of the bankruptcy court to seize property or interfere with the operation of a business without cause. Certainly justice could not permit such penalties to be visited on a litigant, who is pursuing remedies which the

courts have held proper and applicable when his claim is just and his cause a proper one, even though the court after his action is taken by reversal of its former stand holds the procedure he followed was improper. Such a ruling would oust the doctrine of *stare decisis* from the American system of jurisprudence, and would serve notice to all parties that they pursue their remedies at their peril lest some higher tribunal reverse its former position as to the procedure necessary to be followed.

V.

The fees of a trustee and trustee's counsel are not taxable as costs against creditors who filed a petition under Sec. 127 of Chapter X of the Bankruptcy Act in good faith, where the District Court found jurisdiction not withstanding that the District Court was reversed on appeal and held to be without jurisdiction for lack of pending cause or for failure to establish corporate existence of the debtor under state statute.

In the first place, the fees of a trustee and the trustee's counsel are not taxable as costs. Rule XXXIV of the Rules in Bankruptcy of the Supreme Court of the United States, provides that in cases of involuntary bankruptcy where the debtor resists an adjudication, and the court, after hearing, adjudges the debtor a bankrupt, "the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a civil action cognizable as a case in equity; and if the petition is dismissed, the debtor shall recover like costs against the petitioner."

This rule was construed by the District Court for the Southern District of New York in a case entitled, *In*

Re Ghiglione, 93 Fed. 186, 187. In that case, the court held that Sec. 3 (e) of the Bankruptcy Act, which provided for taxing counsel's fees, expenses and damages, where an involuntary petition was dismissed was inapplicable for the reason that it applied only to cases where an application is made to take charge of and to hold the property of an alleged bankrupt prior to adjudication. The court further held, "The allowance of 'counsel fees' in addition to costs can rest only on express statutory provision. It is contrary to the ordinary federal practice .***" The recovery of the counsel fees was there denied.

In the case of *In re Rome,* 162 Fed. 971, 974, the court refused to include counsel fees to the attorney for the successful party as costs in a bankruptcy proceeding on the grounds that there was no authorization in the statute for such inclusion. Both of these cases were cited with approval by the Second Circuit Court of Appeals in the case entitled, *In re Borok,* 50 Fed. 2d, 75, page 78 in which case the court concluded:

> "The appellee has advanced neither reason nor authority to sustain charging against the appellants counsel fees for the attorneys of the receiver and trustee. This was clearly error."

In the case of *McIntosh* v. *Ward,* 159 Fed. 66, the Seventh Circuit Court of Appeals held that it was not within the discretion of the court under the name of costs to require one party to pay to another items paid from the fund for services and expenses in administering the fund. The court says on page 69:

> "For depreciation under the receiver's care and management appellant was not responsible. So the court could not, on any principle of law or equity, give to appellees further damages for the merged

> wrongs and frauds by adding to the account the amount the court had been expending from the partnership fund for conserving and carrying on the partnership business."

That is precisely what the order of the District Court of September 25, 1943 sought to do in this case. The compensation to the trustee and his counsel constituted sums expended in conserving the estate before the court and carrying on the business.

In the second place, expenses of administration cannot be taxed against petitioning creditors in bankruptcy in the absence of an appointment of a receiver, or the preadjudication seizure of property.

In the case entitled, *In re National Carbon Co.*, 241 Fed. 330, C.C.A. 6, the court said on page 332:

> "There is, in express terms, no statutory authority for the awarding of trustees' compensation and attorney's fees against petitioning creditors."

The court analyzed this question at length and concluded that rules applicable to liability for expenses and damages in receivership cases are not pertinent to mere denials of petitions for adjudication of bankruptcy cases "not involving preliminary seizure of the debtor's property." The court in that case further concluded that if it be assumed that petitioning creditors may be required to respond in cases in which there was maliciousness or bad faith in the prosecution of a bankruptcy petition that the recovery cannot be had by summary proceeding. The court in that case held that there could be no recovery, and said on page 334:

> "*** but the alleged bankrupt was all the time confessedly subject to adjudication upon proper complaint, the petitioning creditors acted under a view of their legal rights which view the District Court

approved, and they did not proceed upon false allegations, or otherwise attempt to deceive that court."

The case is on all fours with the case at bar with the exception that the failure to sustain the jurisdiction in the Appellate Court in that case was estoppel due to the acts of the petitioning creditors themselves; whereas, in this case the failure was not due to any acts of the parties sought to be taxed with the expenses.

We have examined at length the cases cited by the petitioners herein where costs have been assessed against petitioning creditors including expenses, in every instance cited by the petitioners there was either a preadjudication seizure of property or a preadjudication appointment of a receiver, and none of the cases involved a trustee and his expenses. The reason for the distinction is patent. A receiver in a bankruptcy proceeding is appointed on the motion of the petitioners and without awaiting an adjudication of the rights of the debtor, whereas, a trustee is not and cannot properly be appointed until the court has first determined the issue relating to adjudication, and has either adjudicated the debtor insolvent, or in the cases coming under reorganization statutes, adjudicated the petition to have been properly filed and in good faith. In one case the action may be ex parte, whereas in the other it can take place only after a day in court has been afforded the debtor.

The receiver is never appointed except upon the motion of parties, nor is there preadjudication seizure of property except upon the motion of the petitioning parties, whereas, a trustee, is appointed in reorganization in the discretion of the court, and may be, and frequently is, appointed without motion of any party, as was done in this case.

In the third place, expenses of administration are not taxable against parties litigant where the administration creates a fund sufficient to satisfy such expenses. The record shows that the trustee in this case had on hand $18,004.11 (Tr. 68), and this was after payment on account of trustee fees and trustee's attorney fees, except the balance of $1750.00 directed to be paid by the order of September 21, 1943 (Tr. 15). These prior payments aggregated $2500.00 (Tr. 15). Therefore, the trustee had before payment of fees to himself or his attorney an aggregate of $20,504.11. The moneys held by Peer not accounted for, which had been derived from the rents, amounted to $7573.90 (Tr. 11). Therefore, the aggregate moneys in the estate at the time of the trustee's final report, before fees, amounted to $28,078.01. The trustee had received, when he took over the property from the prior custodian, the sum of $8598.62 (Tr. 67-68). According to his testimony he had paid all operating bills and all taxes that had been billed up to the time of his relinquishing possession. Therefore, his operation had resulted in an operating profit of a sum in excess of $19,000.00, and even without the moneys withheld by Peer amounted to approximately $12,000.00. In other words, after allowing for the payment of these fees there would still be a balance in favor of the company of approximately $15,000.00, net gain over the date on which the trustee took possession. Under such circumstances the expenses are taxable against the fund.

This court stated in *N. Y. Dock Co.* v. *Poznan,* 47 S. Ct. 482, 484; 274 U.S. 117, that

> "The most elementary notion of justice would seem to require that services or property furnished upon the authority of the court, or its officer, acting within his authority, for the common benefit of those interested in a fund administered by the

> court, should be paid from the fund as an 'expense of justice.' ***

and in *Warren, et al* v. *Palmer, et al,* 60 S. Ct. 865; 310 U. S. 132, this court said on page 868, Sup. Ct. Edition:

> "This court has held 'upon principles of general application' that courts having custody of property or a fund have the power 'to require that expenses which have contributed either to the preservation or creation of the fund in its custody shall be paid before a general distribution among those entitled to receive it'. Such a power reposes in any court charged with custody of property. It is an *in rem* jurisdiction" **** "which is necessary in order that the court may adequately care for the property."

In Re Veler, 249 Fed. 633, C.C.A. 6, the court on page 641 discussed the cases where expenses of a receivership had been taxed against petitioning creditors and pointed out that they were cases where the receiver had never come into possession of the estate, or where there was no fund in court, excepting that which was the property of those who had always and successfully resisted the appointment of a receiver.

In the case of *Atlantic Trust Company* v. *Chapman,* 28 Sup. Ct. 406; 208 U. S. 360, this court discussed the question of whether expenses created by a receivership which exceeded the assets in the estate should be as to such excess taxed against the complainant on whose petition the receiver was appointed. There this court reversed the lower court decision in which the expenses had been taxed against the petitioner, holding that the receiver was appointed to hold for all parties in interest and was not for the complainant, was not under the control of the complainant, but was under the control of the court, and was exercising the power of the court; and that in the absence of the court's making it a con-

dition of his appointment, or of a contract to that effect or some special conditions which would make it equitable to do so, the complainant was not taxable with the expenses of the receivership.

This court further pointed out that cases in which such expenses had been taxed against the petitioners were cases in which there were special circumstances which made it equitable so to do. There are in this case no such special circumstances appearing. On the contrary, the circumstances of the petition having been filed in good faith and pursuant to a procedure sustained by two cases of the Circuit Court of Appeals, which that court found it necessary to expressly overrule in order to reverse this case, demonstrate that it would be definitely inequitable to saddle these petitioners with the expenses of the trustee.

In re Hurlburt Motors, 275 Fed. 62, the District Court for the Southern District of New York held that the receiver's compensation should come first out of the funds which he held in excess of what he had taken over, that is, the increment or profit derived during the receivership. Here there is a definite increment shown far in excess of the amount of these expenses, and by this rule expenses are payable from the estate.

VI.

Where a suit is dismissed solely for lack of jurisdiction in the District Court, that court is likewise without jurisdiction to tax costs.

We have heretofore considered the merits of the question of the taxing of the trustee's and trustee's attorney fees in which discussion we have assumed jurisdiction to the District Court to make such determinations.

There is, however, no such jurisdiction in the District Court. The mandate was to dismiss the proceeding for want of jurisdiction (Tr. 64). If the dismissal of the petition was the dismissal of the proceeding and the District Court so treated it, then there was no jurisdiction to tax costs other than the costs taxed by the Appellate court, which were incident to the appeal and those costs could be taxed only on a theory that while the District Court was without jurisdiction, the Appellate court did have jurisdiction to review the erroneous decision of the lower court, and, hence, to tax costs therefor.

The law seems to be well established that where a court has been held on review to be devoid of jurisdiction of a cause, it has no jurisdiction after reversal to tax costs.

In *Blacklock* v. *Small,* 127 U.S. 96, 8 Sup. Ct. 1096, 1099 this court in reversing the case which it stated should have been dismissed for want of jurisdiction taxed the costs in this court against the appellants, but ordered the dismissal in the Circuit Court for want of jurisdiction "without costs of that court."

In the case of *Citizens' Bank of Louisiana* v. *Cannon,* 17 Sup. Ct. 89, 90, 164 U.S. 319, this court considered the power of the Circuit Court to tax costs in a case dismissed for want of jurisdiction and said:

> "Having dismissed the bill for want of jurisdiction, the court was without power to decree the payment of costs and penalties."

In the earlier case of *Mayor* v. *Cooper,* 6 Wall, 250, 73 U.S. 851, 852 this court held that where the lower court had held it had no jurisdiction of the case, and yet gave a judgment for the costs of the motion, and

ordered that an execution should issue to collect same, it was clearly erroneous. The court said, "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket."

This court stated that in such case the matter was *coram non judice,* and that "the award of costs and execution was consequently void. Such was the necessary result of the conclusions of the court."

In *Ingle* v. *Coolidge,* 2 Wheat. 363, 4 L. ed. 263 it was stated by the chief justice that "the court does not give costs where a cause is dismissed for want of jurisdiction."

In re Philadelphia & Lewes Transp. Co., 127 Fed. 896, the District Court applied this same rule to a bankruptcy proceeding.

In the case of *Humboldt Lovelock Irr. Light & Power Co.* v. *Smith,* 28 Fed. Supp. 421 D.C. Nev., a three judge court made recent application of this same rule saying, "Where the court has no jurisdiction it has no power to impose costs."

From these decisions, it seems clear to us that where proceedings are dismissed for want of jurisdiction all parties must seek their remedies for such damages as they have sustained, if any, in a plenary suit and cannot recoup expenses by summary action *coram non judice.*

It is noted that the petitioners in this case subscribed to this doctrine and wished to have this rule applied to the District Court with respect to its order of September 21, 1943 and they strongly urged, on page 19 of their argument, that no fees could be allowed to the trustee or his counsel, they having been appointed under a void order. On page 22, they take issue with the Ap-

pellate Court in the authority cited in support of the right of the court to modify a mandate previously issued. The argument is of no consequence, since the Appellate Court did not here modify the mandate, it merely stated that it would have modified it had it found it necessary. What the Appellate Court would have done under other circumstances, we believe, is no ground for granting certiorari. On pages 23 and 24 of their brief in support of the petition herein, petitioners reversed their position and there contended that the court could assess these fees of the trustee and his counsel against these respondents and that such order was valid and proper. Certainly the petitioners are seeking no accolade for consistency, when they, in one breath, say that the order of the court, allowing the fees and expenses, was void and without any jurisdiction, and in the next breath, allege that the order of the court assessing those very same fees, as costs against some of the parties, was a valid exercise of jurisdiction. Just how the court could have taxed these fees as costs against these respondents under what they claim was its valid jurisdiction without having first determined the amounts, exercising what they allege to be a lack of jurisdiction, they failed to explain. The fact is they stated the correct rule first and then departed from it when its application would not result in their advantage. The court was without jurisdiction to enter such an order and the Circuit Court of Appeals was exercising a valid and proper jurisdiction in reversing that part of the order which taxed these fees as costs.

On pages 26 and 27 of their brief, petitioners attack the order on Peer to turn over the moneys held by him after the reversal of the order appointing the trustee and contend that the Appellate Court erroneously sustained this order by assuming that money was collected

before the filing of the mandate. The court made no such assumption. Since the petition of the trustee for accounting by Peer was filed on the same day that the mandate was presented to the District judge, it is a fair conclusion, that at least some of these moneys were collected prior to that day. Inasmuch as the order of July 22, 1943 directed the Trustee to continue to collect the rents for August, pending the return of Judge Barnes on August 25th, it is a fair conclusion that some of the moneys found to be held by Peer were collected after the mandate (Tr. 9). The District Court found that the moneys collected were collected by Peer acting as an agent of the court's trustee; that is a finding of fact (Tr. 11012) which was binding on the Appellate Court and is binding on this court, since there is no evidence to the contrary. If these petitioners were in a position to controvert that finding of facts they should have done so by evidence presented to the District Court, and if not satisfied with the District Court's ruling thereon, should have made timely appeals therefrom. They are now asking this court to review and reverse both the Appellate and the District Court on a finding of facts which they neither appealed within the time nor supplied a record of contradiction thereto. Such is not a ground for certiorari. Whether or not the District Court was correct in its order of July 22, 1943, directing the trustee to continue collecting the rents for the month of August is now an academic question. It would, however, not be an improper exercise of its jurisdiction to settle its accounts for the District Court to order the continued conservation of the estate that it had in its possession until such time as the question of accounting, which was being contested by Peer, could be determined, and this is apparently all that the District Court did.

CONCLUSION.

Upon all the facts and the authorities applicable we conclude:

1. The District Court, if it had authority to fix the fees of the trustee and his counsel, was not in error in charging those fees to the estate in its order of September 21, 1943, there being a fund derived by the operation of the trustee far in excess of the amount of the fees allowed, and we further conclude that the petitioners are in error in their assumption, under their No. 1 on page 12 of their brief, that the proceeding was dismissed by the Appellate Court for lack of jurisdiction over the subject matter. The subject matter was bankruptcy, and there was no question of the jurisdiction of the District Court over the subject of bankruptcy. The question was whether there was a jurisdiction of parties, or whether there was any party respondent before the court.

2. We conclude that where a trustee has been appointed in a bankruptcy reorganization proceedings, after adjudication of the petition as properly filed under Chapter X of the Bankruptcy Act, and where there was no preadjudication seizure of property, or appointment of receiver, the expenses of the preservation of the estate and operation of the business are not taxable as costs to the petitioning creditors.

3. Where there is a dismissal of a proceeding for lack of jurisdiction directed by a Court of Appeals after a holding of jurisdiction below, the court below may enter orders that may be necessary or proper to divest itself of the property and funds it has taken and in doing so may require an accounting of its officers or agents, but may not adjudicate any new matter in the proceeding.

4. The petitioner's assignment No. 3 is academic, inasmuch as the Appellate Court did not modify its mandate in the prior case, but only construed it.

5. While the District Court may have been without jurisdiction to allow fees to the trustee and to the trustee's counsel, where the case failed for want of jurisdiction, neither the Court of Appeals nor this court could properly reverse the order of the District Court in doing so without process running to parties in interest, that is, the trustee and his counsel. The petition herein seeks to have that order reversed by ex parte proceedings. The trustee and his counsel being the only parties respondent to that part of the petition not being before this court.

6. The mandate of the Circuit Court of Appeals gave no authority to the District Court to assess costs against the "petitioning creditors," and particularly gave no direction to single out some of the petitioning creditors as against others included in the mandate without distinction, and the court was without any authority, or jurisdiction to enter the order taxing these fees as costs to these respondents.

7. We have found no question of law involved herein not already well settled by existing authorities, nor have we found any question of law involved on which there is a conflict of existing authorities, hence we respectfully submit that the petition for certiorari ought to be denied in this cause.

Respectfully submitted,

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(23)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 405-6

IN THE MATTER OF

PEER MANOR BUILDING CORPORATION,

Debtor.

J. MARSHALL PEER AND W. D. WITTER,

Petitioners,

vs.

G. J. NIKOLAS, G. J. NIKOLAS & COMPANY, INC., AND HARRY FOOTE, ET AL.,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY.

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PRELIMINARY STATEMENT.

Respondents' statement (p. 6) that they "alone" appealed from the Order which allowed the fees to the Trustee and his counsel is refuted by the record showing (R. 16-17) that the petitioner, Peer, appealed from that Order.

The other statement that the Trustee and his counsel were not respondents below nor respondents here is not supported by any reference to the record. Rule 73 (b) requires the Clerk to mail copies of the Notice of Appeal to the respective parties and it must be presumed that the Clerk performed his duty and that the Court of Appeals, in deciding the issues, (143 F. (2d) 764) had all the parties before it, and failure of a party to appear after being served with Notice of Appeal does not affect the validity of appeal.

I.

The Order of July 22, 1943 Was in Violation of the Mandate.

Only with eyes of respondents can they read in the mandate directing the dismissal of the proceedings for want of jurisdiction the words contained in the Order of July 22, 1943 (R. 9) directing the tenants to pay the future rent to the Trustee whose appointment was vacated by the mandate. After *conceding* (p. 7) that the District Court had "no right to adjudicate any new matter," they attempt to sustain an Order which dealt with new matter. Respondents concede that the District Court was powerless to decide additional and new matters subsequent to the filing of the mandate but they seek to give the impression that the Order directing Peer to turn over the rents related to rents collected *before* the filing of the mandate. This is *contrary* to the record, which shows that a mandate was filed June 28, 1943, and the Petition of the Trustee was filed July 9, 1943, and the Petition sought rents collected *subsequent* to June 28, and commencing with July 1, 1943. The Order appealed from directed Peer to return the rents collected *from July 1 to August 21, 1943,* which were *subsequent* to the filing of the mandate. For this

reason, the statement of the respondents that "when the mandate was presented on July 9, 1943, Peer already held monies he had collected as agent of the Trustee" is inaccurate because the mandate was not presented July 9, but was filed of record June 28, and the rent was collected after the Trustee was ousted by the self-executing Order of the mandate vacating his appointment.

II.

The Order of August 25, 1943, Was Appealed.

We assume that the heading under Point II of respondents' Brief (p. 8) of "July 25, 1943" is a clerical error and that the words "August 25, 1943" are intended. No contention was made below that no appeal was taken from this Order. The Petition for Certiorari is not directed to the District Court but to the Court of Appeals which affirmed the Order of August 25, 1943, and this point is not available to the respondents, even if it were true. However, the record contradicts their statement that no appeal was taken from that Order. This Order was based on the Petition of the Trustee and the Answer of Peer (R. 11) and on the same day when this Order was entered, another Order was entered *continuing* the Motion to Vacate Paragraphs 2, 3 and 4 of the Order entered July 22, 1943 (R. 12). This Order was the *basis* for the Petition and Answer which was determined by the Order of August 25, 1943, which Motion was continued to September 7, 1943 (R. 12) and by other continuances was *finally* disposed of on September 21, 1943 (R. 15). This Order was the final Order as to the payment of the fees, and as to the trustee's right to the July and August rents from which Order the appeal was taken on October 19, 1943 (R. 16) and the appeal was, therefore, timely.

III.

The Order Assessing the Costs Against Respondents Was Proper.

The Argument that the Order assessing the costs against the respondents was not in conformity with the mandate is completely without merit for the reason that the mandate referred to the costs on appeal and had no reference to the costs in the District Court.

IV.

The Respondents Were Liable for the Unnecessary Expenses Incurred by Them.

The contention that the respondents were not liable because they were mere intervenors and not petitioning creditors is completely without merit for the reasons urged in the petition which cited 2 C. J. S. Sec. 118 and is squarely in point. See also *First Nat. Bank* v. *Southern Oil Co.*, 86 F. (2) 33; *In the Matter of Lakor*, 142 Fed. 760.

V.

The Fees of the Trustees and His Counsel Were Taxable Against the Creditors Who Caused Their Appointment To Be Made.

This subject matter was fully discussed in the Petition (pp. 23-35). The cases which they cite do *not* involve complete lack of jurisdiction of parties and subject matter. We may concede that there is a conflict of opinion on this point in the various Courts, and this is added reason for the issuance of the Writ.

It is difficult to follow the reasoning of the respondents. On the one hand, they cite authorities to the effect that the fees of the Trustee and his counsel are not chargeable as costs and where a suit is dismissed for lack of jurisdiction, the Court may not even assess costs. On the other hand, they resist petitioners' efforts to obtain a review from that part of the Order which assessed the costs of administration against the funds collected. The attempt to justify the allowance to the Trustee and his counsel and the taxing thereof against the fund on the ground that there has been an "operating profit" is absurd. This operating profit was derived by depriving the bondholders of the payment of their interest and without setting up a fund for the payment of taxes. Were it not for the wrongful appointment of the Trustee, these funds would have been applied against the debt due to the bondholders and they, therefore, sustained a loss.

That a Federal Court may not charge the expense of administration to the funds where it completely lacked jurisdiction was clearly held in *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640. At page 642, the Court said:

> "As the lower federal courts *lack jurisdiction*, they are necessarily *without power to make any charge upon, or disposition of, the assets within their respective districts.* Even where the Court which appoints a receiver had jurisdiction at the time, but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court. *Where a case is dismissed for want of jurisdiction as a federal court, there is not even power to award costs against the defeated party.* The case at bar is unlike *Palmer* v. *Texas*, 212 U. S. 118, 132, upon which the receivers rely. In that case, the costs and expenses of a receiver erroneously appointed by the federal court were directed to be paid out of funds realized in that court. There the Circuit Court *had jurisdiction*

as a federal court; but the decree appointing the receiver was reversed, because it was erroneous." (Italics supplied.)

This was reiterated in *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 345.

That there is an "*exception*" to the rule that a Court may charge the funds with the expense of administration in cases *where jurisdiction was completely lacking* was also held by this Court in *Burnite Coal Co.* v. *Riggs*, 274 U. S. 208.

It is of no importance whether the Court which lacked jurisdiction was a court of bankruptcy or a court of equity as the underlying principle is not the particular tribunal but the jurisdiction of the court.

VI.

The Courts Are Not in Accord That Restitution May Be Ordered in a Case Dismissed for Lack of Jurisdiction.

The argument under Point VI of the respondents is but a repetition of argument under Point V, and we concede there is a *conflict* of decisions on this point and this is an added reason why the Writ should be issued.

Conclusion.

The Record presents a case where after the reversal of a decree reorganizing the debtor under the Bankruptcy Act, with directions to dismiss the proceedings for lack of jurisdiction of the parties and the subject matter, and ousting the Trustee from the administration of the Estate, the Court proceeded, in violation of the mandate, to direct the Trustee to continue to exercise his functions. It directed the tenants to continue the payment of rent to the ousted Trustee and ordered the owner of the equity to

turn over rents, collected thereafter, to the non-existent Trustee. Yet, the same reviewing Court which ousted the Trustee on the previous appeal for want of jurisdiction now affirms the Order on the ground that it had a right to modify its opinion. There is no precedent for such law. Under such a decision, there would be no finality to any judgment on review. Such a case warrants the issuance of the discretionary writs by this Court to review the decision of the Court of Appeals which is in conflict with the decisions of this Court and the decisions of other Circuits.

Respectfully submitted,

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